"ALTERNATIVE DISPUTE RESOLUTION FOR AIR FORCE CONTRACTS: PRECISION GUIDED SOLUTIONS THAT ARE RIGHT ON TARGET"

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Abstract: This article is an overview of the ADR techniques and procedures used by the Air Force to resolve contract disputes, and can be used as a quick reference to Air Force ADR policy and regulations. Six years have passed since the advent of the Air Force's "ADR First" policy, and the results show that Air Force contractors have much to benefit and nothing to lose by electing to use ADR.

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"A successful lawsuit is the one worn by the policeman."
-Robert Frost

"I was never ruined but twice: once when I lost a lawsuit, and once when I won."
-Voltaire

With the advent of the "ADR First" policy in 1999, United States Air Force contract dispute strategy evolved into a creative quest for mutually agreeable solutions without litigation.[1] The desired effect of this strategic revolution was to foster better business relationships with contractors, increase remedy options beyond those available at trial, and substantially reduce the time necessary to resolve disputes.[2] Six years later, the Air Force's "ADR First" policy has achieved all of those goals and more, making ADR the smart choice for contractors who are unhappy with a contracting officer's final decision. Never before have contractors enjoyed such an abundant variety of contract dispute resolution options that are geared towards achieving fair, expeditious and inexpensive business solutions.

In the "Pre-ADR First" days, once contract dispute negotiations failed, an Air Force contractor had but three choices: appeal the contracting officer's final decision to the Armed Services Board of Contracting Appeals, appeal the contracting officer's final decision to the Court of Federal Claims, or accept the contracting officer's final decision. Given the expense and time involved in litigation, a contractor could expend a small fortune during the many years necessary to reach a final decision at trial. Thus, it may have been a wiser business decision for a contractor to abandon a meritorious claim, rather than undergo litigation.

"ADR First" policy requires that the Air Force use ADR to the maximum extent practicable and appropriate to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level.[3] Once an appeal has been docketed, the Air Force will send the contractor two letters, one upon receipt of the appeal and another sixty days later, informing the contractor of ADR options. Historically speaking, the Air Force offers ADR in over 75% of its contract appeal cases, and of those, more than 40% elect to use ADR.[4]

The Air Force offers ADR for pre-litigation cases that meet published screening criteria,[5] and offers ADR to all litigating contractors unless one of the exceptions found in 5 U.S.C. 572(b) applies.[6] An offer of ADR does not imply that the Air Force expects to win (or lose) the case, but instead indicates that the facts and issues surrounding the case by and large meet the ADR selection criteria and the case is of the type most likely to be resolved by ADR.

In circumstances where ADR is declined by either party, the Federal Acquisition Regulation ensures there will be no mystery about why ADR was rejected. If the contractor requests ADR and the Air Force declines, the contracting officer will explain in writing why ADR was declined, and will cite to one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons why ADR procedures were inappropriate to resolve the dispute.[7] Likewise, where a contractor rejects an Air Force offer of ADR, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.[8]

What Types of ADR Does the Air Force Use?

The types of ADR offered by the Air Force are limited only by creativity and agreement of the parties. Department of Defense[9] and Air Force policy[10] encourage flexible use of ADR procedures, and specifically state that there are no limitations on what sort of ADR the parties can use.

Amongst the ADR modes that the Air Force employs are assisted negotiations at mediation and mini-trials, outcome prediction by early neutral evaluation and dispute review boards, non-binding arbitration, and binding arbitration by summary trial.[11] The Armed Services Board of Contract Appeals offers settlement judges for mini-trials, summary trials with binding decisions, and other structured ADR modes that the Board and parties agree on.[12]

Mediation.

An assisted negotiation by mediation is an ADR forum aided by a neutral third party who has no stake in the result. This type of ADR is effective when the parties have "room to settle," but have been unsuccessful with traditional negotiations. The neutral third party is called a mediator. The mediator is not authorized to impose a settlement upon the parties, but rather assists the parties in fashioning a mutually satisfactory solution to the controversy.

"Facilitative mediation" is the ADR technique in which the mediator simply facilitates discussions between or among the parties, without providing any form of evaluation of the merits of their respective positions.

"Outcome prediction" and "evaluative mediation" are ADR modes in which the mediator provides the parties with his/her views as to the strengths and weaknesses of their respective positions, opines as to potential outcome if the case were litigated, and endeavors to help the parties fashion a mutually acceptable resolution to the controversy.

Mediation is one of the most widely used ADR techniques in the private sector because the flexibility and informality make it useful for a wide variety of matters.[13] In addition, mediation parties never surrender control of the ultimate resolution of their conflict. Contractors who are reluctant to lose control over the outcome of the disputed matter should be especially attracted to ADR by mediation.

The mediation process is completely flexible, and can be designed in a manner that meets the needs of the parties. Typically it begins with all parties meeting in a joint session to share their respective interests and positions. The process often includes a private session between the each of the parties and the mediator to allow further discussion of the case. At times, particularly when emotions run high, the mediator may choose to keep the parties separated and conduct "shuttle diplomacy." The mediator will work with the parties to identify common interests and to narrow the gap between the parties' respective positions.

The mediator serves to structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and assesses the positions taken by the parties during the course of the negotiations. In some cases, the mediator may propose specific suggestions for settlement. In other cases the mediator may guide the parties to generate more creative settlement proposals amongst themselves. During mediation, the parties retain the power to resolve the issues through an informal, voluntary process. If a mutually agreeable settlement is possible, the mediator's role is to bring the parties to closure.

Early Neutral Evaluation.

Early neutral evaluation (also referred to as "outcome prediction" or the "settlement judge" approach) has many of the same features as mediation. But outcome prediction adds the neutral's review of the parties' positions and the information they provide. Furthermore, the neutral discloses his/her evaluation of the relative strengths and weaknesses of each party's position. These evaluations can be given to the parties individually or jointly. The early neutral evaluation/outcome prediction mode of ADR is a non-binding process. The parties generally select a neutral with subject matter expertise whose opinion they respect, and frequently turn to the ASBCA judges to perform this function.

Mini-Trial.

Despite the name, a mini-trial is not a small trial, but is instead a more structured process that includes the use of each of the party's senior principals. Mini-trials permit the parties to present their case (or an agreed upon portion of the case) to their principals, who have authority to settle the issue in controversy. Often these presentations are made with the assistance of a third-party neutral advisor, who might meet with the principals after the mini-trial to attempt to mediate a settlement. The neutral may also issue a formal written non-binding advisory opinion. The parties' ADR agreement can also provide for limits on discovery for the proceeding.

The mini-trial presentation itself may be a summary or abbreviated hearing with or without oral testimony. After the presentation, the principals often begin negotiations with the aid of the neutral as mediator or facilitator. The neutral's role is pre-defined by the written ADR Agreement. The neutral generally presides at the presentation of the case, sets the ground rules, and as in other ADR actions, sees that the proceeding is

conducted according to the ADR Agreement. The neutral often has expertise in the federal rules of evidence and substantive law and may be called upon for advisory rulings on questions likely to arise if the matter proceeds to litigation. If the neutral has subject matter expertise then the ADR agreement may also permit the Neutral to question presenters and witnesses. The neutral's learned questions can frequently focus the parties' attention on critical issues.

Because of the neutral's evidentiary rule and substantive law expertise, the mini-trial ADR mechanism is excellent for resolving factual issues or mixed questions of law and fact. Further, this ADR technique highlights the strengths and weaknesses of the case. Settlement authority for mini-trials is the same as for negotiated settlements. At the conclusion of the mini-trial presentation the decision-making principals usually adjourn to negotiate the matter. The neutral may be called upon to act as advisor, mediator or fact-finder in this subsequent session depending upon the terms of the ADR agreement and the desires of the parties.

Arbitration.

Arbitration is an issue resolution process whereby a neutral third party is empowered by agreement of the parties to issue a decision on the controversy. In this process the neutral is called an arbitrator. Arbitration is commonly used in the private sector, and the decision can be either binding or non-binding, according to the ADR agreement.[14] A binding ADR would be one in which the proceeding results in a decision that is final and conclusive, and may not be appealed or set aside absent a showing of fraud.[15]

There are significant legal restrictions on the use of binding ADR[16] within the Department of Defense. The only binding ADR method available to the Air Force is summary trial before an ASBCA judge. The Department of Defense is not authorized to use binding ADR proceedings unless the arbitrator is an ASBCA judge.

Summary Trial with Binding Decision.

A summary trial with a binding decision permits the parties to expedite the appeal schedule and to try their appeal informally before an administrative judge or panel of judges. The greatest distinguishing feature between an ASBCA trial and an ADR summary trial before the ASBCA is that in a summary trial the parties design the trial process (format, timing, rules, etc.), with the assistance of a judge who is often selected by the parties. Generally, the parties elect to have one judge decide the case, submit pre-hearing position papers (instead of post hearing briefs) and opt for more streamlined evidentiary presentations. The judge(s) will issue a verbal "bench" decision shortly after conclusion of the proceeding, followed by a summary written decision later.

Under most circumstances, the nearly immediate decision upon conclusion of the trial is one of the greatest advantages of the ADR summary trial process. By comparison, a traditional ASBCA trial judgment is rendered only after the parties submit post-trial and

reply briefs, the two other judges review the trial record and briefs, and the three judges then agree on a written decision. It is difficult to determine how long this process will take, but it customarily exceeds a year. Furthermore, under traditional ASBCA trials, the trial decision can still be appealed, thus delaying certainty on the matter for years. The decision by an ASBCA judge in a binding summary trial is rendered almost immediately upon trial's conclusion, and can not be appealed, thus providing expeditious finality to the controversy.

The Parties Make the Rules:

One of the great benefits of selecting ADR is the parties' ability to set the parameters of the proceedings to suit their goals. The ADR agreement can encompass a great variety of issues and results in a tailor-made resolution plan. At the parties' agreement, ADR ranges from utterly informal meetings, to formal procedures modeled on actual trial. Discovery rules are drafted by the parties and set within their comfort levels. The location of the ADR proceeding, opportunity for ex-parte communications, and use of evidence is up to the decision of the parties. ADR results are not binding precedent, and if the parties wish, there are no written transcripts of the proceedings to influence future dealings amongst the parties. Because ADR is so flexible, these proceedings lend themselves to a wide variety of presentation technology, including teleconferencing and virtual courtroom videoconferencing. The distribution of ADR costs is negotiable in an ADR agreement, as well as Equal Access to Justice Act[17] lawyer's fees for those qualifying contractors whose ADR results in an order of settlement.[18] Issue resolution by ADR isn't an all-or-nothing proposition. The parties may decide to resolve only a portion of a claim by ADR and litigate the other issues,[19] or may decide to resolve multiple claims all in one ADR. And, perhaps best of all, ADR almost always resolves both entitlement and quantum awards at the same time.

If ADR Fails, You're No Worse Off:

A contractor's right to appeal a decision to the ASBCA is not compromised by attempting ADR, unless of course the parties agree to this as a term of the ADR agreement. If an appeal is pending before the ASBCA, and the parties elect to try conflict resolution by ADR, then the ASBCA grants a suspension of the proceedings for ADR resolution.[20] If a non-binding ADR proceeding fails to resolve the dispute, then the ASBCA simply restores the appeal to the active docket.[21] And, there are no strategic reasons for a party to avoid ADR in order to protect their case. The ASBCA's rules are promulgated to promote candid participation by the parties, since neutral advisors and settlement judges who participated in an ADR that failed to settle are ordinarily recused from participation in a trial on that same matter unless the parties specifically request otherwise, and the ASBCA Chairman approves the request.[22] Likewise, the ASBCA neutral may not discuss the ADR case with any other board personnel.[23] Furthermore, most ADR agreements include a confidentiality clause which prevents any matters submitted at an ADR from coming back to haunt the parties at subsequent trial. Under such confidentiality clauses and applicable law, any written

material prepared specifically for ADR, any oral presentations made at an ADR proceeding and any discussions between the parties during ADR are inadmissible in any future board proceeding.[24] Conversely, the parties aren't faced with the dilemma of if-you-use-it-then-you-lose-it since evidence otherwise admissible at trial is not rendered inadmissible because of its use at an ADR proceeding.[25]

The Biggest Contractors Use ADR First:

The top Air Force suppliers have a standing ADR corporate agreement with the Air Force. Further, the Air Force's biggest programs, known as Acquisition Category I and II Programs for items such as the B-2 Stealth Bomber, C-17 Globemaster III airlift plane, C-5 Galaxy airlift plane, F-15 Eagle fighter jet, F-16 Fighting Falcon, Predator Unmanned Aerial Vehicle, and the Space-Based Infrared Systems, all have similar ADR agreements with the Air Force.[26] Because ADR is offered to any Air Force contractor whose dispute fits the ADR criteria, the time and money saving benefits achieved through ADR are equally available to both the Davids and the Goliaths of the Air Force contractors.

The Results are In, and You Don't Want Be Left Out:

In rough numbers, for the five years prior to 1999's inception of the Air Force's "ADR First" policy, $1 billion in contract claims were resolved at trial.[27] A survey of the contract claims made in the five years since inauguration of the "ADR First" policy shows that approximately $1 billion in contract claims were made during this period.[28] Curiously, both before and after ADR, the dollar amount of claims filed were approximately the same, and the average settlement percentages remained steady. However, despite the fact that the dollar amounts paid were within 1% of each other, the results couldn't be more different since the time necessary to resolve ADR cases was dramatically shortened from years to months.[29] Though it's clear that ADR doesn't work as an "ATM" for claiming contractors, it certainly is a money saving time machine that speeds up resolution by years and consistently reaches fair results.

[1] Air Force Policy Directive 51-12, *Alternative Dispute Resolution*, para. 2, 9 January 2003.
[2] *Id*.
[3] *Id*. at para. 3.
[4] Report to the Secretary of the Air Force on the Air Force ADR Program, FY 2004, available at http://www.adr.af.mil/afadr/secaf/SECAF_Report_2004.pdf.
[5] Air Force ADR Program, *Air Force Alternative Dispute Resolution Reference Book*, available at http://www.adr.af.mil/acquisition/factors.html#2Section, last visited 22 June 2005.
[6] U.S. DEP'T OF THE AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP., PART 5333.090 (2002).
[7] U.S. FEDERAL ACQUISITION REG., PART 33-214(b) (Jun. 2005) [hereinafter FAR].
[8] *Id*.
[9] Department of Defense Doctrine (DODD) 5145.5, *Alternative Dispute Resolution (ADR)*, April 22, 1996, ch. 3, para. 3.1, defines ADR as "Any procedure that the parties agree to use, instead of formal adjudication, to resolve issues in controversy, including, *but not limited to*, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or any combination thereof. (emphasis added).
[10] Air Force Policy Directive (AFPD) 51-12, *Alternative Dispute Resolution*, 9 January 2004, page 4, Attachment 1, defines ADR as "Any procedure in which the parties agree to use a third party neutral to resolve issues in controversy, *including but not limited to*, facilitation, mediation, factfinding, minitrials, arbitration or use of omsbudsmen, or any combination thereof."
[11] *Air Force Alternative Dispute Resolution Reference Book*, *supra*, note 6, available at http://www.adr.af.mil/acquisition/choosing.html, last visited 26 June 2005.
[12] Armed Service Board of Contracting Appeals, *ASBCA Notice Regarding Alternative Methods of Dispute Resolution*, available at http://www.law.gwu.edu/ASBCA/rule.htm#dispute, last visited 22 June 2005.
[13] Don Arnavas, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS, 8 (2004).
[14] Binding arbitration is rare amongst federal agencies since its use requires approval from the head of the agency and the Attorney General. 5 U.S.C. § 575(c).
[15] American Bar Association Special Committee on Alternate Dispute Resolution Section of Public Contract Law, ALTERNATIVE DISPUTE RESOLUTION: A PRACTICAL GUIDE FOR RESOLVING GOVERNMENT CONTRACT CONTROVERSIES 18 (1999).
[16] FAR 33.214(g).
[17] 5 U.S.C. § 504 (2005). EAJA has two effects: (1) it waives the immunity of the United States to claims for attorney fees in situations in which other civil litigants would be subject to such fees, and, (2) it applies fees to the United States when they would not ordinarily apply if the individual opposed to the United States meets certain income criteria defined by the Act.
[18] 5 U.S.C. § 504(b).
[19] FAR 33.214(c).
[20] ASBCA Rule 30.
[21] ASBCA Notice, *supra* note 13.
[22] *Id.*
[23] *Id.*
[24] 5 U.S.C. § 574 (2005), as implemented by FAR 33.214(e).
[25] ASBCA Notice, *supra* note 13.
[26] If visited from a military networked computer, a sample of an Air Force ADR Corporate Agreement is available at https://www.safaq.hq.af.mil/contracting/toolkit/adr/corpagree/SampleCorpAgree2.rtf, a list of Air Force ADR corporate Agreements is available at https://www.safaq.hq.af.mil/contracting/toolkit/adr/corpagree/index.html, and a list of Air Force Program ADR Agreements is available at https://www.safaq.hq.af.mil/contracting/toolkit/adr/adr_docs/MOA.html, (last visited on 26 June 2005).
[27] Interview with Mr. Joseph McDade, U.S. Air Force Deputy General Counsel (20 June 2005).
[28] *Id*.
[29] From docketing to resolution, cases resolved by ADR average 18 months, while litigated cases average 38 months. FY 2004 ADR Program Report to the Secretary of the Air Force, n.4 above.